No. 13091

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN BOAT BUILDING COMPANY, a Partnership, and UNITED PACIFIC INSURANCE COMPANY, a Corporation,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and ROBERT MARKOVICH,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE J. FRANK McLAUGHLIN, *Judge,*
Sitting by Assignment

BRIEF FOR APPELLEE J. J. O'LEARY

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QUESTIONS PRESENTED BY THE APPEAL

The principal questions involved in this action appear to be:

1. Whether the locus of the injury was such as to bring it within the jurisdiction of the Longshoremen's Act?

2. What effect, if any, the payment of compensation under the Workmen's Compensation Laws of the State of Washington had upon the injured employee's rights under the Federal Law?

3. Were the plaintiffs (appellants) entitled to a trial de novo before the District Court upon the issue of whether the injury occurred upon the navigable waters of the United States.

STATEMENT

The Case

This cause arises upon a petition to set aside as not in accordance with law, and to enjoin the enforcement thereof, a compensation order filed on March 20, 1951, by J. J. O'Leary, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, in which he awarded compensation to Robert Markovich, hereinafter called "the claimant," for disability due to an injury received on October 18, 1950, arising out of and in the course of his employment with the plaintiff Western Boat Building Company at Tacoma, Washington, at which time plaintiff United Pacific Insurance Company was the insurance carrier of the employer.

The deputy commissioner's compensation order complained of was issued pursuant to the provisions

of the Longshoremen's Act, and reads in part as follows:

"Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

"That on the 18th day of October, 1950, the claimant above named was in the employ of the employer above named at Tacoma, State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act and that liability of the employer for compensation under the said Act, was insured by the United Pacific Insurance Company; that on said date the claimant herein, while performing service as a Fastener for the employer and engaged in work incidental to the repair of the tugboat EL SOL which was then located on a Marine railway at the yard of the employer, sustained personal injury resulting in his disability when, while walking alongside a lifeboat on the upper deck of said vessel, he lost his balance and fell over the side of the vessel, a distance of approximately 40 feet, in consequence of which he suffered a compression fracture of the first lumbar vertebra, multiple abrasions and contusions of shoulders and left ribs; that the marine railway on which the vessel was located is approximately 150 feet long and the lower portion of same extends into the water; that during the time the vessel was undergoing repairs on said marine railway, the stern of the vessel was partially submerged in the navi-

gable waters of Puget Sound at high tide; that the employment in which the claimant was engaged at the time of his injury was maritime in nature and that said injury occurred upon navigable waters of the United States and comes within the purview of the Longshoremen's and Harbor Workers' Compensation Act: that written notice of injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to $2,936.75; that as a result of the injury sustained the claimant was wholly disabled from October 19, 1950 to March 14, 1951, on which date he was still so disabled, and he is entitled to 21 weeks compensation at $35.00 per week for such temporary total disability; that the accrued compensation for temporary total disability to March 14, 1951, inclusive, amounts to $735.00; that the employer and insurance carrier have paid nothing to the claimant as compensation."

The Evidence

Before discussing the legal questions, it would appear desirable to summarize the evidence to show what claimant was doing when he was injured, to identify the place from which he fell, as well as the place where the fall ended.

ROBERT MARKOVICH, the claimant, testified in part as follows:

That he was 58 years of age at time of accident and employed by the Western Boat Building Company, and that his usual work was that of a fastener (Tr. 33); that the duties of a fastener are to drill holes for the bolts in planking and "anything to be fastened." (Tr. 33); that in the ordinary course of his duties as a fastener, he would have occasion to go out on boats that were on navigable water or on marine ways (Tr. 34); that he had done that frequently, that the employees went anywhere they were ordered to go, either when the boat is on the water or tied up at the dock (Tr. 34); that in the ordinary course of his employment he worked on ships on the water and on the marine railway, and on other ways; that the tug EL SOL was on the marine ways (Tr. 34), and that the marine railway runs down into the water about 100 or 150 feet (Tr. 35); that the tug had been placed on a cradle and taken out of the water and was standing on the marine railway at the time he was working on the tug, (Tr. 35); that at high tide part of the keel would still be in the water (Tr. 35); that the crew was still on the tug, eating and sleeping thereon (Tr. 36); that on his first day of work on the tug he was taking some ration boxes out of the lifeboats at the direction of Mr. Petrich (Tr. 36); that he went up to the top of the boat and was walking around there when he

fell (Tr. 37); that he had put his weight on the tank, jerked it a couple of times and it came loose (Tr. 37); that he turned around and started to walk back on a space eight or ten inches wide and stepped on a loose board which caused him to fall about 40 feet off the boat (Tr. 37); that he hit the scaffold in falling and landed partially in the water although the tide was going out (Tr. 38); that he was standing "just about midship" when he fell (Tr. 43); that after he landed he heard someone calling "Pull him out of the water". (Tr. 43).

Vern M. Stangland testified in part as follows: That he was the bookkeeper for the Western Boat Building Company (Tr. 47); that the company carried liability insurance under the terms of the Longshoremen's Act (Tr. 47); that all the workers in the yard, including the office, are covered (Tr. 47); that at high tide the bottom of the tug EL SOL would be partially covered by water on the marine railway at the time of the accident (Tr. 49); that the tug had been on the marine railway two to four days and the crew was on board (Tr. 49); that to the best of his recollection the boat was returned to the water the next day (Tr. 50); that the tug was approximately 136 feet in length and better than 200 tons (Tr. 51); that the marine rails project

out into the water and the boats are pulled "up on the dry dock" through the medium of an electric motor and winch (Tr. 56); that the bottom end of the dock is always in the water (Tr. 57); that the upper part of the cradle is out of water "when the boat is docked", that it can be run "clear out into the water so that it is submerged on the lower part". (Tr. 57); that they can either finish the boat completely "in the dock," or haul it up for cleaning and painting the bottoms (Tr. 57).

Karl Koch testified in part as follows: that he was employed by the Western Boat Building Company as a "fastener" (Tr. 52); that he was working on the "EL SOL" at the time of the accident (Tr. 53); that he heard a noise, went over, and saw Markovich "laying down in the water" (Tr. 53); that Markovich was lying in about a foot of water; that he had to go into the water and turn Markovich around "to get him on dry land" (Tr. 53); that he (Koch) frequently went out on boats in the stream to work on them as well as on the marine ways (Tr. 53); that Markovich had also done such work (Tr. 54); and that if the work can be done on the water the boats are not brought in (Tr. 54).

PERTINENT STATUTES

The pertinent portions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424 33 U.S.C.A. 901 et seq.,) hereinafter called the "Longshoremen's Act", insofar as applicable to this appeal are as follows:

> "Sec. 903. COVERAGE. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through Workmen's Compensation proceedings may not validly be provided by State law."
>
> "Sec. 919. *Procedure in Respect of Claims.* (a) * * * the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."
>
> "Sec. 920. *Presumptions.* In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary— (a)That the claim comes within the provisions of this chapter."
>
> "Sec. 921. *Review of Compensation Orders.* * * * (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings * * * instituted in the Federal district court * * *"

ARGUMENT

There are but two requirements to bring the injury of an employee injured in the course of his employment within the purview of the Longshoremen's Act. They are: (1) the employment must be maritime, and (2) the injury must occur "upon the navigable waters of the United States (including any dry dock)".

The maritime nature of claimant's employment, namely, repair of vessels, is not questioned by the appellants, (Appellants' Brief 8-9), and for good reason, it being a typically maritime employment.

North Pacific Steamship Co. v. Hall Bros. Co., 249 U.S. 119; *John Baizley Iron Works v. Span*, 281 U.S. 222, Cf. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244.

Appellants, however, do contend that the injury did not occur at a jurisdictional locus within the purview of the Act. They argue that the injury due to a fall from the marine railway in this case was not an injury "upon navigable waters of the United States (including any dry dock)" within the meaning of the Act.

A. A MARINE RAILWAY IS A DRY DOCK WITHIN THE MEANING OF SECTION 3(a) OF THE LONGSHOREMEN'S ACT.

In construing a statute, it is necessary to take into consideration its history and purpose. For a long time prior to the enactment of the Longshoremen's Act there had been considerable confusion and uncertainty as to whether the several states could provide a remedy for employees injured while engaged in employment in and about vessels, such as loading, unloading, refitting and repairing. In the years just preceding the enactment of the Longshoremen's Act, the United States Supreme Court by a series of decisions held that the states could not provide workmen's compensation benefits with respect to injuries sustained by persons engaged in maritime employment and that Congress could not constitutionally delegate authority to the States to provide said workmen's compensation benefits.

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); and *Washington v. Dawson & Co.*, 264 U. S. 219 (1924), in which latter case the court at page 227 said:

> "Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of

> general application embodying its will and judgment. This power, we think would permit enactment of a general Employer's Liability Law or general provisions for compensating injured employees; but it may not be delegated to the several States."

Apparently in response to the suggestion contained in the opinion above quoted, Congress enacted the Longshoremen's Act in 1927.

Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1944).

The Senate report on such legislation states that "the purpose of this bill is to provide for compensation instead of liability for a class of employees commonly known as 'longshoremen'. These men are mainly employed in loading, unloading, refitting and repairing ships." Senate Report No. 973, 69th Congress, first session, Page 16.

By Section 3(a) Congress made the Act applicable to all injuries "occurring upon the navigable waters of the United States (including any dry dock)". It is well known that the form of dry dock known as a marine way or marine railway dry dock is the form generally used upon the navigable waters of the United States, particularly in the interior and Gulf States. They will be found at many of the seaports although at the latter places the graven dock

type is probably used to a greater extent for the largest vessels. According to the "Record of American and Foreign Shipping" of the American Bureau of Shipping, on January 1, 1932, there were 530 dry docks in the United States of which 268, or more than half, were marine railways. In view of the fact that marine railways are in the majority, it is reasonable to assume that Congress when using the expression "including any dry dock" in the Longshoremen's Act had in mind all forms of dry dock and intended to cover all and certainly not to exclude the majority.

In order to understand the function of a marine railway, it is necessary to refer to the class of structures within which it falls; namely, dry docks. A "dry dock" is a structure contrived for the purpose of taking ships out of the water in order to repair them. It may consist of a graven dry dock or a floating dry dock, from both of which the water is withdrawn, or it may consist of a structure with trackage such as a marine railway upon which a vessel is drawn for repairs. The fact that the Supreme Court had referred to a marine railway as a dry dock *(North Pacific Steamship Co. v. Hall Bros. Co.*, 249 U.S. 119 (1919) was known to Congress when it used the term "any dry dock" in the Longshoremen's Act. The ultimate purpose of a dry dock is to withdraw a vessel from the water for the purpose of repairs and while the

type of structure used to perform this service may vary, the operation is essentially the same in each instance. The fact that one may be called a dry dock, another a graven dock, another a floating dock, and another a marine way or railway, does not change the general characteristics of the particular structure or the purpose it serves in its relation to maritime rights or obligations. Such was stated by Judge Woolley in his dissenting opinion in the case of *Norton v. Vesta Coal Company* 63 F. (2d) 165, (C.C.A. 3, 1933), in discussing the several types of dry docks:

> "In these three types of docks there is no difference in purpose or use, or in their relation to maritime rights and obligations. All are concerned with maritime repairs. Each is an instrumentality in the same art. Their only difference is in the methods in which they function. When on a marine railway a vessel, licensed and engaged in commerce is taken high on the land for repairs, there is no question that the contract of labor and the work done upon her at the time are maritime."

In the case of *North Pacific Steamship Co. v. Hall Bros. Co.*, 249 U.S. 119, where the contention was that a maritime lien did not apply because the repairs to the vessel were made on a marine railway and, therefore, not subject to Admiralty and Maritime jurisdiction, the court, on pages 123-129, with respect to question involved herein, said:

" * * * The Shipbuilding Company was the owner of a shipyard, marine railway, machine shops, and other equipment for building and repairing ships, situate upon and adjacent to the navigable waters of Puget Sound at Winslow, in the same state, and had in its employ numerous mechanics and laborers. Under these circumstances it was agreed between the parties that the Shipbuilding Company should tow the vessel from where she lay to the shipyard, haul her out as required upon the marine railway to a position on dry land adjacent to the machine shop, — the place being known as the "dry dock", and the hauling out being described as "docking," — and should furnish mechanics, laborers, and foremen as needed, who were to work with other men already in the employ of the Steamship Company, and under its superintendence; * * * At the time the contract was made, another vessel (the Archer) was upon the dry dock, and it was uncertain how soon she could be returned to the water. It was understood that the Yucatan should be hauled out as soon as the Archer came off, should remain upon the dry dock only during such part of the work as required her to be in that position, and at other times should lie in the water alongside the plant. * * *

"The vessel was docked and repaired in the manner contemplated by the agreement; she was brought to the shipyard on the 27th of May, and lay in the water alongside of the dock there until the 17th of June, during which time upper decks and beams were put in and other work of a character that could be done as well while she was afloat as in the dry dock. On June 17 she was hauled out and remained in dry dock for about two weeks while her bottom plates were renewed. * * *.

"The question in dispute is whether a claim thus

grounded is the subject of admiralty jurisdiction; appellant's contention being that the contract, or at least an essential part of it, was for the use by appellant of libellant's marine railway shipyard, equipment, and laborers in such manner as appellant might choose to employ them, and that it called for the performance of no maritime service by libellant.

* * * * *

"In The Robert W. Parsons *(Perry v. Haines)* 191 U.S. 17, 33, 34, 48 L. ed. 73, 80, 81, 24 Sup. Ct. Rep. 8, it was held that the admiralty jurisdiction extended to an action for repairs put upon a vessel while in drydock; but the question whether this would apply to a vessel hauled up on land for repairs was reserved, the language of the court, by Mr. Justice Brown, being: 'Had the vessel been hauled up by ways upon the land and there repaired, a different question might have been presented, as to which we express no opinion; but as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs'.

"* * * In *Peyroux v. Howard*, 7 Pet. 324, 327, 341, 8 L. ed. 700, 701, 706, the vessel, requiring repairs below the water line as well as above, was to be and in fact was hauled up out of the water; and it was held that the contract for materials furnished and work performed in repairing her under these circumstances was a maritime contract. We think the same rule must be applied to the case before us; that the doubt intimated in The Robert W. Parsons, supra, must be laid aside; and that there is no difference in character as to repairs made upon the hull of a

> vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.
>
> "This is recognized by the Act of Congress of June 23, 1910 (Chap. 373, 36 Stat. at L. 604, Comp. Stat. 1916, Sec. 7700), which declares that 'any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic,' upon the order of a proper person, shall have a maritime lien upon the vessel."

It is submitted that the term "any dry dock", as used in the Longshoremen's Act, includes a marine way or a marine railway as well as a graven dock, floating dry dock, or structure of a similar design used for similar purposes.

On three occasions the question whether an injury upon a marine railway is an injury upon "any dry dock" within the meaning of Section 3(a) of the Longshoremen's Act has been decided by a United States Court of Appeals. In *Norton v. Vesta Coal Company*, 63 F. (2d) 165 (C.C.A. 3, 1933), by a divided court, it was held that the term "any dry dock" did not include a marine railway. In *Continental Casualty Company v. Lawson*, 64 F. (2d) 802 (C. C. A. 5, 1933), also by a divided court, it was held that an injury to an employee upon a marine railway

comes within the term "any dry dock", the court, on pages 804-805, stating in part:

> "It was within the power of Congress to extend to employees working on marine railways the same right to compensation for injury received in the course of their employment that it admittedly has provided for employees working on floating and graven dry docks. Indeed, in *North Pacific Steamship Co. v. Hall Brothers*, 249 U.S. 119, 39 S.Ct. 221, 63 L. Ed. 510, a marine railway in a shipyard was referred to as a dry dock, and it was said that the nature of the service was the same whether repairs were made while the vessel was afloat, or in dry dock, or hauled up on a marine railway. The doubt previously intimated in The Robert W. Parsons, 191 U.S. 17, at pages 33 and 34, 24 S.Ct. 8, 48 L. Ed. 73, was there resolved in favor of the admiralty jurisdiction over marine railways in cases depending upon contract. In *State Industrial Commission of State of New York v. Nordenholt Corp.*, 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933, 25 A.L.R. 1013, it was said that an award under a state compensation law is not made on the theory that a tort has been committed, but that the law under which such an award is made is read into and becomes a part of the contract of employment between employer and employee. And the same is true of an award made pursuant to the act under consideration, which 'within its sphere * * * was designed to accomplish the same general purpose as the Workmen's Compensation Laws of the states.' *Crowell v. Benson*, 285 U.S. 22, 40, 52 S.Ct. 285, 288, 76 L. Ed. 598. * * * In our opinion it was not the intention of Congress to provide compensation for harbor workers only while they were working on ships that had been placed on floating or graven docks and

to deny compensation if the same employees happened to be repairing a vessel on a marine railway. Such workmen might have been engaged on the same day in all three classes of work, since it is not unusual in a large shipyard for employers to use all three methods of taking ships out of the water for the purpose of repairing them during the same day or even at the same time. The act does not undertake to provide compensation for injuries occurring on the ordinary dock or wharf used in loading and unloading cargo, doubtless because in the opinion of Congress, either this kind of dock, being an extension of the land, was exclusively within the jurisdiction of the states, *Cleveland Terminal & V. Co. v. Cleveland S. S. Co.*, 208 U.S. 316, 28 S.Ct. 414, 52, L. Ed. 508, 13 Ann. Cas. 1215; *State Industrial Commission of State of New York v. Nordenholt Corp.*, supra; *Smith v. Taylor* 276 U.S. 179, 48 S.Ct. 228, 72, L. Ed. 520; or because the Act would not apply to most cases of injury to longshoremen who usually are employed to work on the dock or wharf not by the shipowners but by independent contracting stevedores. The use of the phrase 'including any dry dock' in Section 3 discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction over the former but not over the latter class of work. * * *."

This decision was cited with approval by the fourth circuit. See *Travelers Insurance Company v. Branham*, 136 F. (2d) 873, 875 (1943).

The court's assertion that it was within the power of Congress to extend to the employees work-

ing on marine railways the same remedy which it has extended to employees working on floating and graven docks was given approval by implication recently by the United States Supreme Court in *O'Donnell v. Great Lakes Dredge and Dock Company*, 318 U.S. 36 (1943), where the court sustained the right of a seaman to recover under the Jones Act for an injury which occurred upon land. Compare also *Aguilar v. Standard Oil Company of New Jersey*, 318 U.S. 724 (1943); *Strika v. Netherlands Ministry of Traffic*, 185 F. (2d) 555 (C.A. 2, 1950).

In *Maryland Casualty Company v. Lawson*, 101 F. (2d) 732 (C.C.A. 5, 1939), it was again held, this time by a unanimous court, that the term "any dry dock" in the Longshoremen's Act includes a marine railway. The court at pages 733-734 said:

> "Appellants contend that a marine railway is not a dry dock within the meaning of the law, relying upon *Norton v. Vesta Coal Co.*, 3 Cir., 63 F. (2d) 165, and *Rohlfs v. Dept. of Labor and Industries*, 190 Wash. 566, 69 P. (2d) 817, which are in point but not controlling. We held to the contrary in *Continental Casualty Co. v. Lawson*, 5 Cir., 64 F. (2d) 802, and decided that a marine railway is to be considered a dry dock within the meaning of the statute. Our decision finds support in *Butler v. Robins Dry Dock & Repair Co.*, 240 N.Y. 23, 147 N.E. 235, in which it was held that a workman injured while engaged in repairing a vessel in a graving dock

was constructively on navigable waters when the accident occurred.

"Technically, a dry dock is a watertight basin which after pumping out allows examination and work upon the bottom of a vessel. A graving dock, except for details of construction, is the same. A floating dock receives a vessel when the dock is submerged, after which the watertight compartments of the dock are pumped out and the buoyancy of the dock raises the vessel. A marine railway is an inclined structure at the water's edge which extends below the water. It carries a cradle which moves on rollers or wheels. The cradle runs below the water and receives the vessel which is then hauled out. Bradford, Glossary of Sea Terms, 'Dry Dock' 'Railway.'

"In enacting the Longshoremen's and Harbor Workers' Compensation Act it was clearly the intention of Congress to give the same rights and remedies to those employed in work of a maritime nature as are enjoyed by other workers under the provisions of state workmen's compensation acts. The act is to be liberally construed to effect its purpose. *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 409, 52 S. Ct. 187, 76 L. Ed. 366.

"In construing the act we are not bound by technical definitions but must interpret it by giving to the words used their ordinary meaning. Courts of admiralty may take notice of terms in general use in maritime affairs. *Brown v. Piper*, 91 U.S. 37, 23 L. Ed. 200. In nautical parlance 'dry dock,' 'floating dock' and 'marine railway' are interchangeable terms. Necessarily, all are located on navigable waters and used for exactly the same purposes, i.e., to raise a ship out of the water to permit examination and repairs to her hull which are impossible while she is afloat. A

> ship's master speaks of 'dry docking' his vessel regardless of which method is to be used. That the words have a common meaning is illustrated by this case. Although operating a marine railway, appellant calls itself a dry dock.
>
> "There are few dry docks, technically considered, in the United States. Floating docks or marine railways or both are to be found at every seaport. It must be presumed that Congress intended to protect the great majority of laborers employed on floating docks and marine railways as well as the comparatively few workmen employed on what are to be technically considered dry docks. We entertain no doubt that in extending the law to cover 'any dry dock' Congress intended to include marine railways. Cf. *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L. Ed. 157, and *Warner v. Goltra*, 293 U.S. 155, 55 S. Ct. 46, 79 L. Ed. 254."

It is therefore respectfully submitted that the history and purpose of the Longshoremen's Act would seem to warrant the conclusion that Congress intended that said Act should cover workmen who were employed in repairing vessels which are temporarily drawn upon marine railways and that the later decisions in *Continental Casualty Company v. Lawson*, supra, and *Maryland Casualty Company v. Lawson*, supra, are more in keeping with modern concepts of Admiralty jurisdiction than the earlier decision of *Norton v. Vesta Coal Company*, supra.

It might be added that the Government maintains

its position that the Longshoremen's Act covers injuries which occur on a marine railway notwithstanding the inference which the appellants are pleased to draw (Appellant's Brief 15, 16) from the statement of the United States Supreme Court when it dismissed a writ of certiorari in *Norton v. Vesta Coal Co.*, supra, upon the ground that "it appears that the Government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this court". The Government's position is clearly indicated by its two successful appeals which it prosecuted on the same question in the later cases of *Continental Casualty Co. v. Lawson*, supra, and *Maryland Casualty Company v. Lawson*, supra.

If it be necessary to distinguish the Norton case, supra, from the instant case, it might be stated that in the Norton case after the vessel had been raised from the waters of the Monongahela River, the cradles of the marine railway were removed and the boat was blocked up about 75 feet from the water's edge, whereas in the instant case, the tug was resting on the marine railway and part of the tug was in the water, and when the employee fell from the tug he fell into the water.

This distinction in no wise detracts from the

convincing reasoning expressed by Judge Woolley as to the intention of Congress to cover injuries occurring on marine railways.

B. CLAIMANT'S EMPLOYMENT ENTIRELY MARITIME AND NOT VALIDLY COVERED BY STATE COMPENSATION ACT.

1. Local Concern Doctrine No Longer Applicable.

With the advent of the State Workmen's Compensation law, came the conflict between Federal and State jurisdictions with respect to injuries sustained by workers along the shore (longshoremen) and harbor workers. Beginning with *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) and followed by *Knickerbocker Ice. Co. v. Stewart*, 253 U.S. 149, and *Washington v. Dawson and Company*, 264 U.S. 219, the Supreme Court held that the states could not apply State Workmen's Compensation laws to injuries sustained by employees which occur upon the navigable waters.

> See report of Senate Committee on the Judiciary, accompanying bill enacted as Longshoremen's Act, S.R. 973, 69th Congress, 1st Session, Page 16.

Between the Jensen decision in 1917 and the enactment of the Longshoremen's Act in 1927, there grew up what was known as the "local concern" doc-

trine. It was a "stopgap" accepted by the Supreme Court for the purpose of granting relief to those employees injured on navigable waters who would otherwise have had no remedy. It permitted state law to grant the remedy in the form of workmen's compensation where it would not interefere with the general maritime law. Among such cases were *Sultan Railway Co. v. Department of Labor* 277 U.S. 135; *Grant-Smith-Porter Co. v. Rohde*, 257 U.S. 469; *Millers' Indemnity Underwriters v. Braud* 270 U.S. 59; *Alaska Packers Association v. Industrial Commision of California*, 276 U.S. 467. Each of the cases, it should be noted, arose prior to enactment of the Longshoremen's Act.

The Grant-Smith-Porter case, supra, sometimes referred to as the Rohde case, involved work on an incompleted vessel, which work was clearly non-maritime, under long judicial history.

The *Millers' Indemnity Underwriters v. Braud* case, supra, involved work of a diver in connection with removing timbers from an abandoned set of ways once used for launching ships. While this work had some maritime flavor, it did not constitute maritime employment. In distinguishing the Braud case in the later case of the *London Guarantee and Accident Company v. Industrial Accident Commission of California*, 279 U.S. 109, the Supreme Court specifically

stated that the employment in the Braud case "was not maritime". In the Braud case the deceased employee's representative was allowed to recover under the Texas Workmen's Compensation law.

In the case of *Alaska Packers Association v. Industrial Accident Commission*, supra, a person engaged in general work in and about a cannery was injured while standing upon the shore and endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock, where it was to be lifted out and stored for the winter. This work was non-maritime and not within the exclusive admiralty jurisdiction. The employee was allowed to recover under the California Workmen's Compensation law.

In *Sultan Railway Co. v. Department of Labor and Industries of the State of Washington*, supra, the employee was engaged in assembling saw logs in booms and the breaking up of booms, which had been towed on a river to a sawmill. An award for injuries under the Washington Workmen's Compensation law was sustained in this case. The employment connected with the local operation of the sawmill was likewise non-maritime.

In *London Guarantee and Accident Company, Ltd. v. Industrial Accident Commission of California,*

supra, the Supreme Court, speaking through Chief Justice Taft, stated specifically that the employment in the Rohde case, the Alaska case, Braud case, and Sultan Company case was non-maritime. It will thus be seen that in the cases in which the Supreme Court has applied the local concern doctrine the employment was not maritime. If, therefore, the contention be sustained that the employment in the instant case was maritime, it must follow that the local concern doctrine has no application.

See Vol. 1, Am. Jur. Admiralty, Sec. 50, P. 576.

As will be seen from the summary of the foregoing decisions of the Supreme Court, the so-called doctrine of local concern arose out of a series of decisions of that court upon cases which arose prior to the passage of the Longshoremen's Act and involved conflict between Federal Maritime jurisdiction and the State jurisdiction under Workmen's Compensation laws. Under this doctrine the court apparently sought to concede to the states the right to afford relief through their own compensation statutes in cases where the injury arose in connection with work which was of merely local concern, there being then no Federal statute providing such relief; but just as in the field of interstate transportation by railroad, the jurisdiction which the states had exer-

cised to afford relief in this field during the absence of Federal remedial legislation, disappeared upon the passage of the Federal Employers' Liability Act.

> See *New York Central Railroad Company v. Winfield*, 244 U.S. 147.

Similarly, on the passage of the Longshoremen's Act any jurisdiction exercised by the states to afford in certain (very likely borderline) cases a measure of relief as a matter of local concern, likewise disappeared. The Federal Government, although it may have acquiesced in the exercise by the States of jurisdiction in an unoccupied field of Federal jurisdiction, completely ousted whatever State jurisdiction was presumed to exist when it finally entered that field and exercised its own jurisdiction therein through the Longshoremen's Act. None of the cases decided by the Supreme Court, and usually cited in support of the so-called local concern doctrine, involved a fact situation which would have come within the Longshoremen's Act, if it had then been in existence. The only case arising since the Longshoremen's Act became effective in which the Supreme Court had occasion to pass upon the question of the existence of State jurisdiction as a matter of local concern within the field now covered by the Longshoremen's Act is the case of *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244

(1941), supra, and in that case the Supreme Court refused to apply such doctrine, holding that the death of the employee came within the purview of the Longshoremen's Act and not within the purview of the State Compensation law.

The local concern doctrine was evolved only to supplement the long standing test of jurisdiction in admiralty in tort cases, namely, locus, by inquiring not only where the injury occurred but also what the employee was doing, that is, if he was engaged in maritime employment. Before that doctrine was evolved the mere fact of injury on navigable waters was sufficient to establish jurisdiction in the Federal Admiralty Courts. In *Imbrovek v. Hamburg-American Steam Packet Co.*, 190 F. 229, (Md. 1911) the court at Page 233, said:

> "The Supreme Court has said 'Every species of tort, however occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.' The Plymouth, 3 Wall. 37, 18 L. Ed. 125. This language was used 45 years ago. The Supreme Court has never intimated any dissatisfaction with it."

The Imbrovek case was affirmed by the Court of Appeals, 4th Circuit sub nom. *Atlantic Transport*

Co. of West Virginia v. Imbrovek, 193 F. 1019 in a memorandum decision, which stated:

> "We find ourselves in full accord with the views of the court below, on all questions raised by the assignments of error."

When the case reached the U. S. Supreme Court, 234 U.S. 52, the latter court in affirming the judgment of the court below, quoted at Page 59 of its opinion from the early decision above mentioned:

> "The jurisdiction of the Admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters. The vessel itself was unimportant. * * * The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality — the high seas or navigable waters where it occurred. 'Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable water, is of admiralty cognizance'."

Finally, in *London Guarantee and Accident Co. v. Industrial Commission,* 279 U.S. 109 (1928) the court, at Page 123, said:

> "Objection is made that the deceased here lost his life by drowning when he was not on a vessel in the navigation of which he had been employed as a seaman. This is immaterial. He was lost in navigable waters. He was engaged in attempting to moor and to draw into a safe place the vessel with relation to which he was em-

> ployed. It is clearly established that the jurisdiction of the admiralty over a maritime tort does not depend upon the wrong having been committed on board a vessel but rather upon its having been committed upon the high seas or other navigable waters. The Plymouth, 3 Wall. 20, *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 59, 60."

See also *Merritt-Chapman & Scott v. Bassett*, 50 F. Supp. 488 (1943), where the employee was injured while repairing a lighthouse.

Since the enactment of the Longshoremen's Act, the reason for the doctrine and the doctrine itself have disappeared so far as cases coming within the purview of the Longshoremen's Act are concerned. In the case of *Parker v. Motor Boat Sales, Inc.*, supra, the Supreme Court held in effect that in all cases of Admiralty and Maritime jurisdiction, federal jurisdiction is exclusive and state action forbidden. The decision in the Parker case was anticipated in the case of *Continental Casualty Company v. Lawson*, 64 F. (2d) 802 (C.C.A. 5, 1933), where the court at Page 805, said:

> "The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter. * * * State compensation laws and this compensation law of Congress are mutually ex-

clusive of each other. The existence of the Act of 1927 must be taken into consideration and given effect in determining whether under Section 3 (33 U.S.C.A. Sec. 903) thereof the compensation laws of the states are valid and applicable; for state laws cannot now validly apply to a subject-matter over which Congress has exercised its exclusive jurisdiction."

See also *Moore v. Christiensen S.S. Co.*, 53 F. (2d) 299 (C.C.A. 5, 1931).

The case of the *DeBardeleben Coal Corp. v. Henderson*, 142 F. (2d) 481 (C.A. 5, 1944) fully discusses the exclusiveness of Federal jurisdiction in maritime cases before and after the period of the "local concern" doctrine. At Page 483 of that decision, the court said:

"As the Parker case pointed out, it is not at all necessary now to redetermine the correctness vel non of the Jensen case or of any of the brood, hatched from it, which, teetering and wavering on the line the Jensen case had drawn between State and Federal jurisdiction, drew it now on this, and now on the other, side as hard cases piled up to make bad law worse. It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery * * * may not validly be provided by State law' was placed in the Act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the Act from judicial condemnation by making it clear that it did not intend to legislate beyond its constitutional powers. Having in mind the confused and confusing mass of quasi legisla-

> tive decisions which, as such decisions always tend to do, had rendered the law almost hopelessly uncertain, this provision was inserted to avoid, not to provide, a new basis for further judicial trimming. In the applicaton of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the 'local concern' doctrine to save to employees injured on navigable waters, and other wise remediless, the remedies State Compensation laws afforded them. In short, the Federal Compensation Law now in effect, the judicial tergiversations which went on before its passage no longer have point. This is what we held in the Lawson case, what the Supreme Court held in the Parker case, supra. We adhere to that holding. The judgment was right. It is affirmed."

In *Travelers Insurance Co. v. McManigal*, 139 F. (2d) 949 (C.A. 4, 1944), on Page 953 of the reported decision, the court, while decrying the doubts which have beset the courts and litigants in this field of law through the uncertain limits of the spurious doctrine of local concern, in no uncertainty concluded:

> "But if the conclusions we have reached in this case with respect to the locality of the injury and the nature of the employment of the deceased are valid, there is no room for the application of the rule announced in cases of the Rohde class."

2. The Payment of Compensation Purportedly Under the State Law Did Not Oust Federal Jurisdiction.

The appellants contend at Page 30 of their brief that the State law provided claimant's "exclusive remedy for compensation". That would be true if there were no other jurisdiction or remedies than those afforded by the State. Certainly, it could not be contended that the State intended to immunize its workers, regardless of employment, from any form of Federal compensation in the event of injury.

Even if, contrary to what appellees have herein expressed, there could be concurrent jurisdiction between a State and the Federal Government with reference to an injury which arose out of maritime employment, action under the State law would not oust Federal jurisdiction.

> *United States Fidelity and Guaranty Company v. Lawson*, 15 F. Supp. 116 (Ga. 1936); *Great Lakes Dredge and Dock Co. v. Brown*, 47 F. (2d) 265 (Illinois, 1930).

In *Lawson v. Standard Dredging Corp.* 134 F. (2d) 771 (C.A. 5, 1943) at Page 772 of the opinion, the court said:

> "The employees being within the coverage of the Federal Act, provisions of the employment contracts providing for waiver of benefits and the

payment of other and different benefits under the State law are invalid. 33 U.S.C.A., Sec. 915(b)."

The following cases reveal the effect assigned by the court to the acceptance of State compensation, where injury was beyond State jurisdiction:

In *Kibadeaux v. Standard Dredging Co.*, 81 F. (2d) 670 (C.A. 5), where the claim was filed under Texas Compensation Act and acceptance of payments thereunder was without award it was held not to estop recovery of damages by a libel in admiralty, employee's injury being beyond jurisdiction of the State Commission, and certiorari was denied, 299 U.S. 549.

In *Hoffman v. New York, etc. Railroad Co.*, 74 F. (2d) 227 (C.C.A. 2), where the agreement for compensation was approved by Connecticut Compensation Commission, and payments thereunder made, it was held no bar to an action under the Federal Employers' Liability Act, with the injury outside the Commission's jurisdiction, and certiorari was denied, 294, U.S. 715.

In *Gahagan Construction Corporation v. Armao*, 165 F. (2d) 301 (C.A. 1, 1948) where as in the instant case the employee had accepted compensation benefits under the State Compensation Law (Massa-

chusetts) and had subsequently filed suit in Federal Court under the Jones Act, the court said:

> "We do not think the mere receipt of payments under the State Act is sufficient to bind the plaintiff here and prevent his pursuing other remedies he might have on either the law or admiralty side of the court."

In *Kantleberg v. G. M. Standifer*, 7 F. (2d) 922 (Oregon 1920), where the injured employee accepted benefits under the Oregon Compensation Act, the effect was held not prejudicial to employee's rights under Federal law, and the same was held true in *Massachusetts Bonding & Insurance Co. v. Lawson*, 149 F. (2d) 853 (C.A. 5, 1945), where the employee accepted compensation benefits and signed a settlement receipt under the Florida State Law and subsequently filed a claim under the Longshoremen's Act, as in the instant case.

Appellants in their brief at Pages 31-33 argue the full faith and credit clause where there was a question as to compensation to the injured from the several states, but appellees fail to see any application in the instant case.

One view is that an acceptance of compensation under a State Compensation Law is that it is a settlement only of the rights, if any, under the State law, but does not settle the liability of employers to em-

ployees engaged in interstate or foreign commerce or in maritime employment, not within the State law.

Hoffman v. N. Y., N. H. & H. R. Co., 74 F. (2d) 227, 231, (C.A. 2, 1934);

Industrial Commission v. McCartin, 330 U.S. 622.

In the last cited case, the court said that in the absence of "unmistakable language" a statute should not be construed as to "cut off an employee's right to sue under other legislation passed for his benefit".

While appellants might discern a leeway under such decisions for "compensation shopping", (Appellants' Brief 35), nevertheless, to appellees, the maintenance of such rights appears far more preferable to the "short changing" in compensation which otherwise might inure to appellants' financial and unearned benefits if human rights were not so protected.

It does not appear in good taste for the appellants to accuse claimant of "compensation shopping" when it was at their insistence that the State compensation was secured. (Tr. 70-72).

It appears from the record that the payment of State compensation to claimant was the result of efforts of the appellants rather than the result of the mere filing of any claim on behalf of the claimant. This is borne out by the letter of the District Super-

visor (Tr. 69), and the report of the inspector for the Department of Labor and Industries, at the Tacoma Branch, (Tr. 64-65), under assignment dated November 22, 1950, in which it is stated:

> "After investigating the accident to Robert Markovich at the Western Boat Building Company on October 18, 1950, I find it happened as reported on claim slip, and the boat El Sol was still in commission with the crew working days. The boat was on the marine ways at the company plant at E. 11th St., Tacoma. In my opinion, this is a case for the Harbor Workers' Compensation as we have no jurisdiction over boats in commission."

This report might certainly have furnished proper basis for a decision in accordance therewith, and been so accepted by claimant, but for the insistence of the appellants by and through their counsel who under date of November 28, 1950, wrote to the department insisting that compensation should be made under the State compensation law, (Tr. 70-72), and it was not until after receipt of this letter from appellants' attorneys that the department voluntarily and without any communication from the claimant made the payments to which appellants refer and upon which appellants contend the claimant is estopped from claiming any benefits under the Longshoremen's Act. (See Appellenats' Brief, page 30).

In view of the circumstances under which vol-

untary payments of state compensation were made, we cannot agree with appellants' contention that such worked an estoppel against claimant's application herein for federal relief.

> See *Kibadeaux v. Standard Dredging Co.*, supra; and *Massachusetts Bonding & Insurance Co. v. Lawson,* supra.

Again ,the full faith and credit clause of the Constitution which appellants have seen fit to interject into the issues in this case is not applicable in this instance where there is involved the question of Federal versus State jurisdiction.

> United States Constitution, Art. IV, Section 1.

When the States in Article III, Section 2 of the Constitution of the United States extended the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" and in Article VI of the same instrument provided that "this Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land and the judges in every state shall be bounded thereby, anything in the Constitution or Laws of any state notwithstanding," it was not intended that a Federal law relating to a maritime injury and providing an exclusive remedy should be nullified by an award of a state commission under

state law. Moreover, there was no specific adjudication by the Washington Commission upon the issue whether the Federal or State compensation law was applicable, so that in any event that issue is not res adjudicata. *Hoffman v. N. Y., N. H. & H. R. Co.*, 74 F. (2d) 227, 230 (C.A. 2, 1934, cert. den. 294 U.S. 715; *Bretsky v. Lehigh Valley R.R. Co.*, 156 F. (2d) 594 (C.A. 2, 1946).

It should, therefore, be clear that the payments here in question and so made were not res judicata and did not have the effect of a "judgment" under Washington law. In brief, an award of compensation is not a judgment. *Lane v. Industrial Accident Commission*, 54 F. (2d) 338.

Aside from the foregoing consideration, it may be observed that Section 5 of the Longshoremen's Act, 33 U.S.C.A., Sec. 905, provides that the liability of an employer for an injury which comes within the provisions of the Longshoremen's Act shall be "exclusive and in place of all other liability". And, in addition, Section 16 of said Act, 33 U.S.C.A., Sec. 916, provides that no assignment or release except as provided in said Act shall be valid. The acceptance, therefore, of smaller compensation benefits under the state law could not operate as a bar to the rights under the Federal law.

3. "Twilight Zone" Theory Not Applicable.

Appellants appear to be of the opinion that *Davis v. Department of Labor and Industries*, 317 U.S. 249, changed jurisdictional concepts to the extent that they consider the court there held that in cases of apparent conflict between State and Federal jurisdiction, the state may assume jurisdiction of the claim. (Appellants' Brief, pages 23-24). This is an inaccurate view. In the Davis case the employee was engaged in dismantling a bridge spanning a river (a non-maritime employment). At the time of injury, in connection with that employment he was standing upon a barge helping to load steel which had been cut from the bridge, (a maritime employment). Depending upon the elements stressed by the employee before a State or Federal Tribunal, jurisdiction in either tribunal could be sustained. Here the employee applied to the state tribunal because of the non-maritime elements in his employment as dismantler of a bridge. He could have gone before the Federal Tribunal and shown that he was a loader of a barge and thus rested upon the maritime elements. In that case, after reviewing the history leading to the enactment of the Longshoremen's Act, and calling attention to the apparently insurmountable difficulty in fixing the dividing line between Federal and State

jurisdiction, the Court stated that there was undoubtedly a "twilight zone", composed of cases where the facts do not bring them clearly within either the Federal or the State jurisdiction. In such circumstances the court said that it would not interfere with the determination of the agency charged with the responsibility of fact finding and of determining jurisdiction. It stated that it would reject "only in cases of apparent error". Such, however, is a far cry from stating that Federal jurisdiction is ousted (in a case in which the deputy commissioner determines that he has jurisdiction) by a previous determination of a state agency that it has jurisdiction. In fact, the very contrary would seem to be a proper deduction from the Davis case for the following reason that although the appeal in the Davis case was from a determination by a state agency, the court at page 256, stated:

> "Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U.S.C., Sec. 920, which provides that, in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary'. Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight

and will be rejected only in cases of apparent error."

To the same effect, see *Travelers Insurance Co. v. McManigal*, supra, and *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947).

The view above expressed would mean, given the presumption of Federal jurisdiction, plus a finding of jurisdiction by the deputy commissioner in a case where the employee is injured while repairing a vessel, (a clearly maritime employment), at a place within admiralty jurisdiction (whether viewed from the fact that the injury occurred on the marine railway or in the water where he fell), there is no "apparent error" and the deputy commissioner's conclusion should not be rejected.

The Court emphasized in the Davis case (page 258) that "the federal authorities have taken no action under the Longshoremen's Act." The court did not state or intimate in its opinion that the deputy commissioner's jurisdiction under the Federal law is ousted where the state makes the first determination. The entire portent of the opinion is to the contrary. As we have hereinbefore contended in citing a list of authorities, federal jurisdiction is not ousted by the assumption of jurisdiction by the state. The most that can be said is that in these "twilight zone"

cases, if payment should happen to have been made under the state law, such payment may be credited against an award under the Federal statute. *Lawson v. Standard Dredging Corporation*, 134 F. (2d) 771, 772, (C.A. 5, 1943). This is similar to the practice uniformly followed where an injured employee may have concurrent rights under the compensation laws of two separate states. *Industrial Indemnity Exchange v. Industrial Accident Commission*, 182 P. (2d) 309, (Cal. 1947); and *McLaughlin's* case, 274 Mass. 217, 174 N.E. 338. See also in this respect the annotations and cases cited in 101 A.L.R. 1445 and 150 A.L.R. 432.

The case of *Cook v. Minneapolis Bridge Construction Company*, 43 N.W. (2d) 792, (Minn. 1950) appears to be the latest decision concerning an employee who has possible rights under two statutes for the same injury. It fully reviews the subject. Whatever salutary effect the Davis case may have upon resolving the confusion relating to state and federal jurisdiction in injury cases, it should not be misconstrued as holding that an employee who has a right under a Federal statute can be deprived of that right merely by the assumption of jurisdiction by a state tribunal.

C. MOTION FOR TRIAL DE NOVO PROPERLY DENIED.

Appellants argue that the District Court erred in denying to them "a de novo review of the question of whether Markovich was injured on Navigable waters". Appellants waited until the day of trial to interpose their motion for trial de novo, and the decision of that court thereon, as found in the order of dismissal (Tr. 22-25), is in pertinent part, as follows:

> " * * *, and the plaintiffs having interposed their motion for trial de novo upon the question of difference between a marine railway and the term "any dry dock" and if intervenor was injured on navigable waters of the United States, within the meaning of the Longshoremen's and Harbor Workers' Act, *with the offer of expert testimony thereon*, on the ground that the same involved a jurisdictional fact and was open to review, and the court having received the memorandum of the deputy commissioner thereon and heard and considered the arguments of counsel, and it appearing to the court that evidence upon the alleged question of jurisdictional fact has been fully and completely presented before the deputy commissioner and that the plaintiffs do not allege that they have newly discovered evidence or different evidence to present to the court, nor do plaintiffs advance any other valid reason why there should be a new record, and it also appearing that such matter of trial de novo is within the discretion of the court, and the court having for such reasons denied the motion therefor, * * * proceeded to hear and determine this matter upon the transcript of the

record of hearing before the deputy commissioner herein filed * * *." (Emphasis ours.)

Appellants in the court below as well as here rely upon the case of *Crowell v. Benson*, 285 U.S. 22 in seeking trial de novo in proceedings under the Longshoremen's Act, in which case the court, three judges dissenting held that the lower court properly could permit a trial de novo upon the question there at issue of whether the relation of master and servant existed. An analysis of that case and its import and effect requires a consideration of what preceded it, the surrounding circumstances and what has happened since. As hereinbefore stated, prior to the enactment of the Longshoremen's Act the United States Supreme Court in several cases had held that the states did not have authority and Congress could not under the Constitution delegate to them the right to legislate with reference to compensation for employees injured while engaged in maritime employment. That right was considered to belong exclusively to Congress: *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164; *Washington v. Dawson & Co.*, 264 U.S. 219, 227. It was for these employees, longshoremen and harbor workers that the Longshoremen's Act was passed. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 250. When the Longshoremen's

Act was passed (1927) and when *Crowell v. Benson* was decided (1932) review procedure affecting administrative bodies exercising quasi-judicial functions had not fully been developed. Quasi-judicial determinations by administrative officers were then relatively new, and a new concept of public administrative law was in the making. To have legal questions decided through the exercise of quasi-judicial functions by an administrator was still an innovation.

Crowell v. Benson, supra, held, in effect, that findings of fact of the deputy commissioner are final and conclusive except as to those facts which the court variously labeled basic, fundamental or jurisdictional; as to these, the Supreme Court said that the reviewing court could *permit* a trial *de novo.*

In order to understand the kind of "fact" the court was referring to, it is necessary to consider the several possible categories of fact; they are (1) ordinary fact, (2) statutory jurisdictional fact, and (3) constitutional jurisdictional fact. (1) An ordinary fact, for instance, and in respect to the Longshoremen's and Harbor Workers' Act, would be the extent of the employee's disability or the amount of his wages. (2) A statutory jurisdictional fact would be, for instance, whether the injury arose out of and in the course of employment or whether the injured

employee was a member of a crew. *Wm. Spencer & Son Corp. v. Lowe*, 152 F. (2d) 847 (C.A. 2, 1946). If the injury did not arise out of and in the course of the employment, or if the employee were a member of a crew, of course the deputy commissioner would not have jurisdiction *under the statute* to make an award; the limitation imposed upon him exists by reason of the provisions in the statute itself. Such limitation, therefore, would consist of a *statutory* limitation, not a fundamental limitation in the constitutional sense. The facts considered in determining a statutory jurisdictional question are commonly referred to as *statutory jurisdictional facts.* (3) A constitutional jurisdictional fact is one which is considered in determining the jurisdiction of the deputy commissioner from an entirely different standpoint, — not because of a limitation appearing *in the Act*, but bearing upon the question whether Congress had the power or authority to legislate with reference to the particular matter. Here the emphasis is upon the *power of Congress* rather than upon the statutory limitations affecting the deputy commissioner. Under this category the fact question arises in a broader field so as to affect the deputy commissioner's right to act, because of some constitutional prohibition or limitation upon the power of Congress. It is, therefore, to the Constitutional question rather than to the statutory

question that the facts may relate, which gives character to such facts as "constitutional jurisdictional facts," or, as identified by the Supreme Court in *Crowell v. Benson* as basic or fundamental facts. They are called basic or fundamental because upon their existence may depend the jurisdiction of the deputy commissioner to act, not because of the express provisions of the statute, but because of the constitutional limitation of the exercise of the Congressional power.

In what category belongs the fact question — Was the employee injured upon the navigable waters of the United States? The statute provides for the payment of compensation for disability or death only from injury "occurring upon the navigable waters of the United States". The fact of injury upon the navigable waters of the United States is a statutory not Constitutional requirement. There is nothing in the Constitution which would prohibit Congress from providing for compensation for injuries sustained in maritime employment which occurred other than upon navigable waters of the United States. Even in the maritime field the events which Congressional legislation may affect do not necessarily have to occur on water. *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U.S. 36 (1942); *Strika v. Netherlands Ministry of Traffic*, 185 F. (2d) 555 (C.A. 2, 1950); see

also Benedict, The American Admiralty, Fifth Edition, Section 25. There would appear to be no question of the power of Congress in this respect which would give rise to a constitutional fact question or a "basic", or "fundamental" question such as *Crowell v. Benson* speaks of. In *Crowell v. Benson* the question whether the injury occurred upon the navigable waters of the United States was not involved; hence that court's expressions regarding the right of trial *de novo* as to the *locus* of the injury is *obiter dicta* and not binding upon this court in the instant case. *Pacific S.S. Co. v. Peterson*, 278 U.S. 130; *Harriman v. Northern Securities*, 197 U.S. 244; *Williams v. United States*, 289 U.S. 553.

Even as to expressions of the Supreme Court which are not *obiter dicta*, lower courts may decline to follow them where it appears that the court itself in later pronouncements has considered them unsound. *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (W. Va.) aff'd 319 U.S. 624. Moreover, lower Federal Courts need not follow decisions of the Supreme Court where "new doctrinal trends" are indicated by later decisions. *Perkins v. Endicott Johnson Corp.*, 128 F. (2d) 208, 217-218 (C.A. 2) aff'd. 317 U.S. 501. Later decisions of the Supreme Court have all but overruled *Crowell v. Benson* —

See *Davis v. Department of Labor*, 317 U.S. 249, 256; *South Chicago Coal & Dock Co. v. Bassett.* 309 U.S. 251; *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469; cf. concurring opinion in *Estep v. United States*, 327 U.S. 114 at page 142. The Supreme Court has neither cited *Crowell v. Benson* with approval nor followed it in any subsequent case in so far as the expressions therein upon the right of trial *de novo.* Cf. *Myers v. Bethlehem Corp.*, 303 U.S. 41, 50; *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177; *Labor Board v. Hearst Publications*, 322 U.S. 111. The opinion in *Crowell v. Benson* also elicited uniform criticism from legal commentators. See e.g. Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determination of Questions of "Constitutional Fact"* (1932), 80 U. Pa. L. Rev. 1055; Stumberg, *Finality of Administrative Process Under the Longshoremen's and Harbor Workers' Compensation Act* (1932), 10 Tex. L. Rev. 438; 30 Mich. L. Rev. 1312 (1932); 32 Col. Rev. 738 (1932); 10 N.Y.U.L. Q. Rev. 98 (1932); 41 Yale L.J. 1037 (1932); 21 Calif. L. Rev. 266 (1933) 46 Harv. L. Rev. 478 (1933); Larson, *The Doctrine of "Constitutional Fact"* (1941) 15 Temple U.L.Q. 185. Two writers predicted that it would eventually be overruled. Landis, *The Admintrative Process* (1938), p. 141, and *Crucial Issues in Administrative Law* (1940), 53 Harv. L. Rev. 1077,

1093; Davis, *Judicial Emasculation of Administrative Action and Oil Proration* (1940), 19 Tex. L. Rev. 29, 58. *A fortiori* a statement by the court as *obiter dicta* may be disregarded. *Cohens v. Virginia, 6 Wheat.*, 264, 399 (cited with approval in *Humphrey's Executor v. United States*, 295 U.S. 602, 627).

Although Congress had the constitutional *power* to provide the workmen's compensation remedy for injuries sustained on shore, Congress nevertheless confined the application of the Longshoremen's Act to injuries which occur upon the navigable waters of the United States, because longshoremen were already protected by state laws with reference to injuries sustained on land, and Congress merely "filled in the gap" as to the injuries sustained upon the navigable waters; see *Parker v. Motor Boat Sales, Inc.*, supra; and *DeBardeleben Coal Co. v. Henderson*, supra. It is obvious that Congress did not use or exhaust its *full power*. In fact, Congress did include in the Longshoremen's Act coverage as to *some* injuries which occur physically upon land, namely, those which occur upon any dry dock. Sec. 3 (a). Therefore, since a question of fact relating to the locus of injury does not involve the *constitutional authority of Congress to legislate*, but only the jurisdiction of the deputy commissioner to act under the statute, *locus* would be merely a statutory jurisdictional fact ques-

tion similar to other (non-constitutional) fact questions, such as whether a particular injury arose out of and in the course of employment, the absence of which prerequisite would deprive the deputy commissioner of authority to make an award.

At no place in the Longshoremen's Act did Congress provide for a trial *de novo*. On the contrary, it conferred upon the deputy commissioner "full power to hear and determine all questions in respect of such claim" subject only to the power of the court to set aside his order if "not in accordance with law". That phrase was borrowed by Congress from the statute enacted for review by the Circuit Court of Appeals of decisions of the Board of Tax Appeals. The phrase had a well settled meaning at the time of the enactment of the Longshoremen's Act; it was construed by the United States Supreme Court to mean a *review upon the record of the Board*: *Phillips v. Commissioner*, 283 U.S. 589. That is the review which Congress intended to be had under Section 21(b) of the Longshoremen's Act (33 U.S.C.A. Sec. 921 (b)). It is the kind of review generally granted under the workmen's compensation laws of the various states. Numerous decisions of state courts declare the administrative findings of fact to be conclusive. The Supreme Court itself upheld the constitutionality of such finality in the administrative determination in the case

of *Dalstrom Metallic Door Co. v. Industrial Board,* 284 U.S. 594, affirming 256 N.Y. 199, 176 N.E. 141, which arose under the New York Workmen's Compensation Law. To permit the employee to relitigate on a *de novo* basis the issues as to the *statutory jurisdictional facts* would be to disregard the record of the evidence painstakingly produced before the deputy commissioner and to have the proceedings before the deputy commissioner merely a *preliminary hearing* to a trial in court. Such a process would "defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to the task. The object is to secure within the precribed limits of the employer's liability an immediate investigation and a sound, practical judgment, and the efficacy of the plan depends upon the finality of the determination of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded". The foregoing quoted language is from *Crowell v. Benson,* supra, at pages 46-47 of that opinion. In several cases subsequent to *Crowell v. Benson,* the Supreme Court pointedly emphasized that determinations of fact, where supported

by evidence, are final and conclusive and not subject to retrial: *South Chicago Coal & Dock Co., et al. v. Bassett*, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U.S. 162 (1933); *Jules C. L'Hote, et al. v. Crowell*, 286 U.S. 528 (1932); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Marshall v. Pletz*, 317 U.S. 383 (1943). Certainly the question as to *where* an injury occurred is a statutory jurisdictional fact, pure and simple.

Assuming, however, that the issue which appellants below demanded tried *de novo* were a constitutional jurisdictional question, the granting of the request would be within the discretion of the court (this view accords with the opinion expressed in Professor Larson's review of *Crowell v. Benson in The Doctrine of Constitutional Fact*, 15 Temple U.L.Q. 185). The Court in *Crowell v. Benson*, supra, did not say that a trial *de novo* of the basic or fundamental facts was *mandatory*. It merely stated that the lower court did not err in *permitting* such trial *de novo*. See also the decision in *Moran v. Lowe*, 52 F. Supp. 39 (1943) to the same effect. Cf. *Wm. Spencer & Son Corp. v. Lowe*, 152 F. (2d) 847 (C.A. 2, 1946); *Tyler v. Lowe*, 138 F. (2d) 867 (C.A. 2, 1943). See Vol. 30, No. 8 Michigan Law Review, page 1314.

The allegations in paragraph IV of the petition in the instant case would seem to preclude a trial *de novo.* It is there alleged that Markovich on October 18, 1950, was working aboard the tug "EL SOL" which had been pulled onto plaintiffs' marine railway and that the employee "fell from said tug". *There is no dispute as to these facts.* It would thus appear that there is no *real issue of fact,* and that it would be superfluous to again call witnesses to prove the same facts. Appellants did not allege below that they had any evidence differing from that produced before the deputy commissioner as to the *locus* of the injury. In these circumstances, as the court stated in the recent case of *Luckenbach S.S. Co. v. Lowe,* 96 F. Supp. 918 (Pa. 1951):

> "The Act (Longshoremen's Act) was not construed to compel the court to do so (try the case *de novo)* without the exercise of discretion. See *Moran v. Lowe,* 52 F. Supp. 39; Larson, '*The Doctrine of Constitutional Fact*', 15 Temple L.Q. 185, 206 (1941). It appears that the evidence upon the so-called questions of jurisdictional fact has been fully and completely presented before the Deputy Commissioner and the plaintiff does not allege that he has new or different evidence to present to the Court; nor does the plaintiff advance any other valid reason why there should be a new record. On the contrary, he merely claims a trial *de novo* as of right. This Court is unwilling to hear *de novo* the same testimony already offered before the Deputy Commissioner."

And in determining the *locus* of the injury, the court is "aided by the provision of the Federal Act, 33 U.S.C. Sec. 920, that, in proceedings under the Act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary'." See *Davis v. Department of Labor*, supra, at p. 256.

In view of the above, the request for a trial *de novo*, it must be contended, was properly denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the court below denying the motion for trial de novo and dismissing the petition was proper and should be affirmed.

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